

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

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PHILLIP W. THIEMAN,)	DOCKET NUMBER
Appellant,)	AT-844E-96-0742-I-1
)	
v.)	
)	
OFFICE OF PERSONNEL MANAGEMENT,)	DATE: APR 1, 1998
Agency.)	
)	
(CSA 8 070 762))	
)	

Robert E. Levy, Esquire, New York, New York, for the appellant.

Thomas L. Styer, Washington, D.C., for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

Vice Chair Slavet issues a concurring opinion.

OPINION AND ORDER

The appellant timely petitions for review of an initial decision that affirmed the reconsideration decision of the Office of Personnel Management (OPM) denying the appellant's application for disability retirement under the Federal Employees' Retirement System (FERS). For the reasons set forth below, we

GRANT the appellant's petition for review, and REVERSE the initial decision. OPM's reconsideration decision is REVERSED.

BACKGROUND

The appellant, a medical doctor, occupied the GM-15 position of Medical Officer (Aviation Medicine - Administration) with the Eastern Regional Office of the Federal Aviation Administration's (FAA's) Office of Aviation Medicine. *See* Appeal File (AF), Tab 5, Subtab IIF. Due to an increasing staff shortage, the appellant's position became more demanding. *See* Hearing Tape (HT) 1 (testimony of the appellant). On September 11, 1995, the FAA proposed the appellant's fourteen-day suspension based on a charge of abdication of his supervisory responsibilities. *See* AF, Tab 5, Subtab IIE. On September 26, 1995, the appellant consulted with Dr. Hector R. Bird, M.D., a Board-certified psychiatrist. AF, Tab 12 at 7, and Tab 14. Around this time, the appellant began an absence from work on approved sick leave. AF, Tab 12 at 7. The appellant presented to his employer medical reports from doctors indicating that he was suffering from chronic depression and a chronic disc (back) problem that reduced his ability to perform at work. *See* AF, Tab 5, Subtab IID at 18-19, Tab 12 at 22-23. In late 1995, the appellant filed an application for disability retirement based on his major depression and back condition. AF, Tab 5, Subtab IID at 1-8.¹

¹ In his "Applicant's Statement of Disability," the appellant described his medical conditions and his job deficiencies as: "Depression (major) requiring antidepressant (Imipramine) with major sleep disorder, difficulty concentrating due to both depression and medication + fatigue from loss of sleep. Unable to work since late Sept - under psychiatric treatment for major depressive disorder - symptoms began late summer 1994. Related to overwork + short staffing with no secretary, only 2 of 4 physician positions filled - multiple requests for help ignored. Also low back pain, constant and moderate to severe - unable to sit for prolonged periods + varicose veins require elevation of legs which is inconsistent with proper back posture when sitting. 3 discs (lumbar) herniated. Poor memory 2° depression + medication." AF, Tab 5, Subtab IID at 1.

On December 31, 1995, the appellant separated from the FAA by immediate retirement. AF, Tab 5, Subtab IIG.

OPM initially denied the appellant's application for disability retirement. AF, Tab 5, Subtab IIC. On reconsideration, OPM affirmed its initial denial. *Id.*, Subtab IIA. The appellant filed a timely petition for appeal. AF, Tab 1. After a hearing, the administrative judge affirmed OPM's reconsideration decision, essentially finding that the evidence did not show that the appellant was unable to perform the duties of his position while employed by the FAA.

On review, the appellant contests the administrative judge's findings. He also asserts that, after the record closed on review, the Social Security Administration (SSA) granted him disability benefits. In response to a show-cause order issued by the Clerk of the Board, the appellant submitted evidence related to his SSA award. OPM has responded to the petition for review and the evidence relating to the SSA award.

ANALYSIS

In an appeal from OPM's denial of a voluntary disability retirement application, an employee bears the burden of persuasion by a preponderance of the evidence. *See* 5 C.F.R. § 1201.56(a)(2); *Chavez v. Office of Personnel Management*, 6 M.S.P.R. 404, 417 (1981). To qualify for disability retirement under the FERS, an employee must meet the following requirements: (1) The individual must have completed at least 18 months of civilian service that is creditable under FERS; (2) the individual must, while employed in a position subject to FERS, have become disabled because of a medical condition, resulting in a deficiency in performance, conduct, or attendance, or if there is no such deficiency, the disabling medical condition must be incompatible with either useful and efficient service or retention in the position; (3) the disabling medical condition must be expected to continue for at least 1 year from the date the application for disability retirement is filed; (4) accommodation of the disabling

medical condition in the position held must be unreasonable; and (5) the individual must not have declined a reasonable offer of reassignment to a vacant position. *See* 5 U.S.C. § 8451; 5 C.F.R. § 844.103(a). There is no dispute that the appellant satisfied criteria (1) and (5).

The administrative judge found that the appellant did not meet criterion (2) because he did not show that he was unable to perform the duties of his position while employed by the FAA, or that he had a conduct or attendance deficiency that was related to his medical conditions. We agree that the appellant did not show an actual deficiency in performance, conduct, or attendance. Nevertheless, the administrative judge should have addressed whether, in the absence of an actual deficiency, the appellant had a medical condition that was incompatible with either useful and efficient service or retention in his position. *See* 5 C.F.R. § 844.103(a)(2); *Gometz v. Office of Personnel Management*, 69 M.S.P.R. 115, 121 (1995) (although the appellant's disability did not result in a documented service deficiency in performance, attendance, or conduct, it was incompatible with either useful or efficient service or retention in her Sheet Metal Mechanic position); CSRS and FERS Handbook, Ch. 60, Section 60A2.1-2(B) (when an application for disability retirement is based on an employee's warranted restriction from performing critical or essential job tasks, there is often no record of a decline in actual performance).

Here, Dr. Bird diagnosed the appellant in October 1995 as having Dysthymic Disorder (chronic depression) with more acute symptomatology that recently fulfilled the diagnostic criteria for Major Depression. *See* AF, Tab 5, Subtab IID at 9-10, 18. This is a medical condition. *See* 5 C.F.R. § 844.102 ("medical condition" means a health impairment resulting from a disease or injury, including a psychiatric disease); *Mansfield v. Office of Personnel Management*, 67 M.S.P.R. 40, 42 (1995) (depression is a medical condition).

The question becomes whether the appellant's medical condition was incompatible with either useful and efficient service or retention in his position. "Useful and efficient service" means acceptable performance of the critical or essential elements of the position; and satisfactory conduct and attendance. 5 C.F.R. § 844.102. It is enough if the disability detrimentally affects just one of the critical elements of his position. *See Hite v. Office of Personnel Management*, 48 M.S.P.R. 27, 31 (1991). An employee is not, however, prevented from establishing entitlement to a disability retirement annuity, even though his duties are not formalized in a position description. *See Travis v. Office of Personnel Management*, 12 M.S.P.R. 291, 293 (1982).

The record does not include the appellant's most recent performance appraisal for the GM-15 Medical Officer (Aviation Medicine-Administration) position. Nevertheless, the record does include a position description, which indicates that the incumbent has primary responsibility for administration of the regional aviation medicine program; plans, manages, and oversees all regional medical programs and operations; provides authoritative aviation medical advice as the official representative of the Federal Air Surgeon; and supervises the Regional Medical Division staff. *See* AF, Tab 5, Subtab IIF at 2-3. The programs at issue include assuring that medical certifications are only issued to medically qualified airmen in accordance with established regulations, and assuring that air traffic controller physical examinations meet program requirements in accordance with established regulations. *See id.* at 2. The Medical Division also provides medical services to agency field employees who are within commuting distance of the Medical Field Offices, and provides professional advice and guidance to the Regional Administrator on all aviation medicine matters. *Id.* The position description provides that "[t]he nature of [the] duties and responsibilities of this position are such that the degree of Doctor of Medicine is a fundamental requirement." *Id.* at 3. The position description indicates that the "Senior

Medical Advisor/Representative" duties involve rendering expert medical opinions on all facets of aviation medicine, and rendering the final medical decision on difficult or controversial cases. *Id.* at 4. The "grade determination" for the position indicates that it meets the "substantial" level for the range and depth of occupational health activities, which include health evaluations of prospective employees with follow-up in some situations; the level of treatment and emergency medical care given by the facility; and the level of health counseling and general preventive program. *Id.* at 7. The "grade determination" also indicates that the duties of the position "require Board certification in preventive medicine or progressive experience equivalent in breadth and intensity." *Id.* at 8.

The appellant's performance appraisal for the period from August 1, 1989, to July 31, 1990, indicates that the critical elements of the position included ensuring prompt initiation and completion of review of problem airmen medical certification cases, providing effective consultative advice to airmen, aviation medical examiners, and treating physicians regarding the administrative processing of certification cases and the medical aspects of certification decision-making, administering an effective program for health maintenance and medical qualification of air traffic control specialists, and, as permitted by available resources, providing employee health services in regional and field offices, including treatment of on-the-job injuries and illnesses. *See id.* at 20-21. These duties from 1989-90 are consistent with the appellant's testimony regarding his duties. The appellant testified that his position was primarily medical, and nominally administrative given staff cutbacks, which included doctor vacancies in Leesburg, Virginia, and Islip, New York. HT 1. He testified that he had to make medical judgments on a daily basis that involved reviewing air traffic controller physical examinations and pilot certifications to make medical determinations as to their fitness for service. *Id.*

In an October 30, 1995 letter to the agency, Dr. Bird diagnosed the appellant as having Major Depression with symptoms of insomnia, anxiety, depressed mood, diminished self-esteem, increased appetite with recent weight gain, decreased libido, gastrointestinal upset, listlessness, and fatigue. AF, Tab 5, Subtab IID at 18. Dr. Bird noted that it was difficult at that time to make a statement about the prognosis of the condition, but noted that its onset "seems related to stress in the work place, which Dr. Thieman attributes to personnel shortages and increased responsibilities. His depression reduces his ability to perform at work. He is recommended for disability retirement." *Id.*

In a February 27, 1996 letter, Dr. Bird provided OPM with a "current status" of the appellant's condition. AF, Tab 5, Subtab IID at 9-10. He indicated that he had been treating the appellant for a depressive condition, the appellant found himself in a position of great stress at work for a variety of reasons, the psychiatric symptoms had become more severe over the year prior to consultation, and the appellant had "presenting complaints" related to the following symptoms: Insomnia with frequent awakening at night after he falls asleep as well as early awakening; anxiety; depressed mood; diminished self-esteem; increased appetite with recent weight gain of approximately ten pounds; decreased libido; gastrointestinal upset; and poor concentration. *Id.* at 9. Dr. Bird also noted that the appellant complained of feeling listless, tired and slowed down all of the time, and that on his most recent mental status examination, the appellant's affect was depressed and he was frequently tearful, visibly anxious, motorically slowed down, and thinking circumstantially. *Id.* Dr. Bird opined that the appellant would need to continue in treatment for a minimum of another year, but probably longer. *Id.* at 10. Dr. Bird stated that "I do not consider that in his present condition he could work. The present situation prevents him from working and at the same time the financial hardship that his being without financial resources creates serves to make him continue to feel worse." *Id.* Dr. Bird again noted that

the appellant's "depression reduces his ability to perform at work. He is recommended for disability retirement." *Id.*

In a May 16, 1996 letter, Dr. Bird indicated that the appellant "has been afflicted by a severe, chronic depression. The onset of this condition dates back to the Summer and Fall of 1994 and seems to have been associated to stress at Dr. Thieman's place of work and several work-related issues." AF, Tab 5, Subtab IIB at 15. Dr. Bird then described the nature of the work-related stress, noted that the appellant's receipt of a notice of proposed adverse action "further aggravated his condition and led to his first consultation with me on September 26, 1995. He was then placed on sick leave and started treatment with me." *Id.* Dr. Bird indicated that the appellant had been seen for psychotherapy and medication since that time, his response to the anti-depressant had been minimal, and Dr. Bird was "particularly concerned about his sense of hopelessness and the fact that he has expressed having suicidal ideas." *Id.*

Dr. Bird completed a September 5, 1996 SSA "Mental Residual Functional Capacity Assessment," under which he found the appellant, among other things, markedly limited in the ability to: Understand and remember detailed instructions; carry out detailed instructions; maintain attention and concentration for extended periods; perform activities within a schedule; maintain regular attendance and be punctual within customary tolerances; sustain an ordinary routine without special supervision; work in coordination with or proximity to others without being distracted by them; complete a normal workday and workweek without interruptions from psychologically-based symptoms; perform at a consistent pace without an unreasonable number and length of rest periods; accept instructions and respond appropriately to criticism from supervisors; respond appropriately to changes in the work setting; and set realistic goals or make plans independently of others. AF, Tab 12 at 4-5. Dr. Bird indicated that

he had not observed the appellant in a work situation, so these findings were based on the appellant's report. *Id.* at 6. Dr. Bird also indicated that:

My own observations of Dr. Thieman show a patient who is markedly depressed. His speech is pressured, his mood is labile, he cries easily, he is irritable, he expresses suicidal ideas. I have seen him for close to one year. He has not responded to anti-depressant medication. Lately I have seen him only sporadically because he is unable to pay for his treatment. I consider that his condition is chronic. His usual occupation is as a physician. In his present state I would most certainly not refer a patient to him. I consider that in his present mental state he would not be capable of exercising proper judgment in assessment or treatment of a patient. His thinking is circumstantial and his memory is poor.

Id. (original emphasis).

At the hearing, Dr. Bird testified that he had seen the appellant only every four to six weeks beginning in January or February 1996, because the appellant then began living with his parents in Florida for financial reasons, and only traveled to New York sporadically. *See* HT 2. Dr. Bird testified that the appellant was not in any condition to treat patients or render medical decisions because he was preoccupied with other things, could not concentrate, and had an impaired memory. *Id.* He testified that this evaluation had been consistent since the first time he saw the appellant in September 1995, and that it was not "feasible" for the appellant to have performed as a doctor between September 1995 and September 1996. *Id.* He testified that the appellant had not responded to the anti-depressant he had prescribed, and that he did not prescribe a different anti-depressant because the appellant was in Florida and Dr. Bird could not monitor the appellant's reaction to a different drug. *See id.* Although Dr. Bird admitted that he had not read the appellant's position description, he testified that he did discuss with the appellant the duties of the appellant's job that contributed to his stress. *Id.* Dr. Bird's medical opinion was unrebutted by OPM, which did not appear at the hearing or present contrary medical evidence.

The appellant testified that his depression, which began in the fall of 1994, grew worse when the investigation regarding his alleged abdication of his supervisory duties got underway, and that the proposed suspension was the straw that broke the camel's back. HT 1. He testified that he has not practiced medicine since he left the FAA, and he cannot practice medicine because he is "a mess." *Id.* He testified that he is unable to make medical judgments because he is obsessed, upset, angry, and depressed. *Id.* As the administrative judge found, the appellant cried out several times during the hearing. *Id.*

The appellant's position as a Medical Officer required him to, among other things, render expert medical opinions on all facets of aviation medicine, render the final medical decision on difficult or controversial cases that involve the medical fitness of pilots and air traffic controllers, and provide medical services to agency field employees. Dr. Bird, however, has indicated that, while still employed by the FAA, the appellant's medical condition left him incapable of treating patients or rendering medical decisions. *See Schwaier v. Office of Personnel Management*, 61 M.S.P.R. 49, 52 (1994) (to qualify for a disability annuity, an employee must show that he became disabled while in a position subject to the FERS); *cf. Bridges v. Office of Personnel Management*, 21 M.S.P.R. 716, 719 n.4 (1984) (the need for a criminal investigator to be mentally stable is a factor which may be properly considered in evaluating qualifications for disability retirement). Under these circumstances, and considering the SSA's award of disability benefits, *see* Petition for Review File, Tab 12;² *Trevan v. Office of Personnel Management*, 69 F.3d 520, 526 (Fed. Cir. 1995) (the Board must

² Although the appellant's SSA disability application was based on chronic intervertebral disc disease and chronic disabling depression, it is not clear from the SSA's notice of award whether the award was based on both conditions. Petition for Review File, Tab 12. Nevertheless, the SSA found that the appellant became disabled on September 29, 1995, while he was employed by the FAA. *Id.*

consider an award of social security disability benefits in determining entitlement to FERS benefits), we find that the appellant has shown by preponderant evidence that his medical condition was incompatible with either useful and efficient service or retention in his position. In addition, we find that the disabling medical condition was expected to (and did) continue for at least one year from the date the appellant filed his application for disability retirement, and that accommodation of the disabling medical condition in the Medical Officer position was unreasonable. *See* AF, Tab 5, Subtab IID at 4 (in a "Certification of Reassignment and Accommodation Efforts," an agency official indicated accommodation was not an option because "medication prevents employee from performing his assigned duties in any capacity. There are no other positions Dr. Thieman qualifies for/or can perform in this agency.").

Accordingly, the appellant has met his burden of proving by preponderant evidence that he is entitled to a disability retirement annuity under FERS.³

ORDER

We ORDER OPM to award the appellant disability retirement benefits. OPM must complete this action within 20 days of the date of this decision.

We also ORDER OPM to inform the appellant of all actions taken to comply with the Board's order and of the date on which it believes it has fully complied. *See* 5 C.F.R. § 1201.181(b). We ORDER the appellant to provide all necessary information that OPM requests in furtherance of compliance. The appellant should, if not notified, inquire about OPM's progress. *Id.*

³ We agree with the administrative judge's finding that the appellant was not entitled to a disability retirement annuity based on his back condition because he did not establish the extent to which his back pain could be controlled by medication. *See, e.g., Royster v. Office of Personnel Management*, 68 M.S.P.R. 655, 661 (1995) (subjective evidence of pain must establish the degree to which the pain can or cannot be controlled), *aff'd*, 91 F.3d 170 (Fed. Cir.) (Table), *cert. denied*, 117 S. Ct. 440 (Nov. 12, 1996).

Within 30 days of OPM's notification of compliance, the appellant may file a petition for enforcement with the New York Field Office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes there is insufficient compliance, and should include the dates and results of any communications with OPM about compliance. *See* 5 C.F.R. § 1201.182(a).

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO THE APPELLANT REGARDING FEES

You may be entitled to be reimbursed by OPM for your reasonable attorney fees and costs. To be reimbursed, you must meet the criteria set out at 5 U.S.C. §§ 7701(g) or 1221(g), and 5 C.F.R. § 1201.202. If you believe you meet these criteria, you must file a motion for attorney fees **WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION**. Your attorney fee motion must be filed with the regional office or field office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Washington, D.C.

Robert E. Taylor
Clerk of the Board

CONCURRING OPINION OF BETH S. SLAVET, VICE CHAIR

in

Phillip M Thieman v. Office of Personnel Management

MSPB Docket No. AT-844E-96-0742-I- 1

Although the majority finds that the appellant "had a medical condition that was incompatible with either useful and efficient service or retention in his position," it concludes that he "did not show an actual deficiency in performance, conduct, or attendance." Opinion and Order at 4 (emphasis added). Yet, as stated on page 2 and other parts of the Opinion and Order, the appellant was facing discipline for "abdication of his supervisory responsibilities," which shows an actual deficiency in performance. Moreover, Dr. Bird, the appellant's treating psychiatrist, "indicated that, while still employed by the FAA, the appellant's medical condition left him incapable of treating patients or rendering medical decisions." *Id.* at 10 (emphasis added). Both tasks were a significant part of the appellant's duties. *See id.* at 5. As for an actual deficiency in attendance, the Opinion and Order notes that the appellant was on a three-month period of approved sick leave prior to his separation, and that the absence, according to medical reports, was due in part to chronic depression. *See id.* at 2.

In light of the record evidence, I would find that, in addition to showing that he had a medical condition that was incompatible with either useful and efficient service or retention in his position, the appellant also established that his condition caused an actual deficiency in performance, conduct, or attendance. The latter finding would correct the finding in the initial decision that "the evidence did not show that the appellant was unable to perform the duties of his position while employed at the FAA." *Id.* at 3.

APR - 1 1998

Date

Beth S. Slavet

Beth S. Slavet, Vice Chair